

Shum (Migration) [2018] AATA 2422 (31 May 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Mei Sze Shum

CASE NUMBER: 1700678

DIBP REFERENCE(S): BCC2015/3204886

MEMBER: Simone Burford

DATE: 31 May 2018

PLACE OF DECISION: Perth

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211(2) of Schedule 2 to the Regulations
- cl.820.221(1) of Schedule 2 to the Regulations
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Statement made on 31 May 2018 at 3:44pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Whether a genuine spousal relationship exists – Joint household – Joint finances – Relationship held out to others – Relationship viewed as genuine and ongoing – Decision remitted with direction

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, 820.211, 820.221

1.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision of a delegate of the Minister for Immigration on 10 January 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 29 October 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2) because there was insufficient evidence that the parties were in a genuine and continuing spousal relationship.
5. The applicant appeared before the Tribunal on 9 March 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's sponsor, Mr Kee Chong Soh, and Ms Lay Peng Tee, who is the applicant's friend. The Tribunal hearing was conducted with the assistance of an interpreter in the Cantonese and English languages.
6. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing. The applicant's registered migration agent was invited to make submissions prior to the conclusion of the hearing and gave brief oral submissions in support of the applicant's application.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The applicant is a Chinese national born in 1977. She is sponsored by Mr Kee Cheong Soh, an Australian permanent resident born in 1975.
9. The issue in the present case is whether the relationship between the applicant and the sponsor meets the definition of 'spouse' in section 5F of the Act.

Whether the parties are in a spouse or de facto relationship

10. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian permanent resident.
11. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties'

household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

12. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties provided a copy of a Western Australian Marriage Certificate issued by the Registrar of Births, Deaths and Marriages listing the date of marriage as 1 October 2015. The marriage took place in the Registry of Births, Deaths and Marriages, Perth, Western Australia. On the evidence, the Tribunal is satisfied that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

13. In forming an opinion whether they are in spousal relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is attached to this decision.
14. The Tribunal had before it the Department's file relating to the applicant. The Tribunal also had before it the delegate's decision which applicant provided to the Tribunal in filing her application for review. The Tribunal had regard to the material referred to in the delegate's decision, and other material available to the Tribunal, including material submitted by the parties prior to and at the commencement of the hearing. The parties were also given additional time following the hearing to provide any further information they wished the Tribunal to take into account. A submission from the applicant's registered migration agent was received subsequent to the hearing and has also been taken into account by the Tribunal.

15. Relationship background

16. The parties' gave consistent evidence concerning the development of their relationship. The parties' written and oral evidence claim that they met online on 10 November 2013. They then started chatting regularly on WhatsApp. At this stage the sponsor was going through a divorce and was dealing with custody issues relating to his children from that relationship who had returned to Hong Kong from Australia with their mother. At this time the applicant was also living in Hong Kong but the sponsor was in Australia.
17. The parties gave evidence the applicant was aware of the martial circumstances of the sponsor at this time and provided support to him via their conversations and through this they developed a friendship.
18. Later in November 2013 the sponsor travelled to Hong Kong to attend Court hearings in relation to his child custody issues. The parties first met in person in Hong Kong on 21 November 2013 during the sponsor's visit.
19. Following the sponsor's departure from Hong Kong the parties maintained contact via WhatsApp and IDD. Evidence of the WhatsApp conversations was provided. In February 2014 the parties agreed to meet in Singapore for Valentine's Day. During this trip the sponsor bought the applicant a ring to demonstrate his commitment to '*go steady*', however the parties gave evidence that the applicant was hesitant to enter into a serious commitment while the sponsor's earlier relationship issues remained outstanding.

20. The applicant visited the sponsor in Perth in June 2014. During this visit the parties spent time together and decided the applicant would return again in October 2014 when she had annual leave. The parties maintained contact during the separation via Line. Documentary evidence was provided for these communications.
21. The applicant visited Australia again in October 2014, staying with the sponsor and meeting some of his friends. The parties continued to communicate following the applicant's departure. Evidence of these communications was provided to the Tribunal.
22. The sponsor was divorced in January 2015. In February 2015 the applicant returned to Perth and the parties gave evidence that on this visit they looked at houses and cars together and the applicant was baptised in the sponsor's church. Photographic evidence of the baptism was provided and a third party statement from a member of the couple's church provided support for their account of the baptism.
23. The parties met again in Singapore in March 2015, staying with the sponsor's parents. The parties' evidence was that the purpose of this trip was to introduce the applicant to the sponsor's parents and tell them about their plans to marry.
24. The applicant travelled to Perth again in May 2015 and the parties obtained a Notice of Intention to Marry from the Perth Marriage Registry.
25. During this visit the parties looked at purchasing property. A house was bought in the name of the sponsor following advice from the mortgage broker that the applicant's visa status would present a problem for the parties making a purchase in both names. However the parties maintained that the house was purchased as a couple as their home in Perth. They provided evidence of a transfer of over \$100,000 from the applicant to the sponsor as a contribution to the purchase of the property.
26. The applicant visited Perth again in July to August 2015. During this visit the applicant and sponsor spent time with the applicant's friends and celebrated his birthday. Photographic evidence was provided from this visit.
27. The applicant returned to Hong Kong to finish work and settle her affairs there. She returned to Perth in September 2015 and the parties were married on 1 October 2015 at the Perth Registry. Both parties' parents attended the wedding as witnesses and are listed on the marriage certificate. The parties indicated that friends were unable to attend the wedding because the registry ceremony took place on a weekday during work hours.
28. On 2 October 2015 the parties held a wedding celebration at a local restaurant with family and friends. Photographic evidence of this event was submitted.
29. The applicant and the sponsor both gave evidence at the hearing. The Tribunal questioned them at length about their relationship. The Tribunal took evidence regarding the development of their relationship, their relationship history, knowledge of each other's background and family history, financial, social and household aspects of their relationship and the nature of their commitment to each other. Their responses were generally consistent. The Tribunal regarded minor differences in their evidence as indicative of them providing authentic responses from their own perspectives and knowledge.
30. The Tribunal found the applicant and sponsor to be credible witnesses and accepts their oral evidence on this basis. The Tribunal has considered their oral evidence, and that of their supporting witness, together with the additional documentary evidence submitted at the review stage in reaching its findings.

31.

32. *Financial Aspects*

33. The Tribunal has had regard to the evidence provided relating to the financial aspects of the relationship including joint ownership of assets and joint liabilities, the extent of pooling of financial resources, any legal obligations owed by the parties and any sharing of the day-to-day household expenses.
34. The parties provided financial information which reflects their financial circumstances. This information included utility accounts in both parties' names for address in Nollamara. The parties also provided individual and joint bank statements also addressed to the parties at the Nollamurra address.
35. The parties' evidence is that while the applicant was working in Hong Kong she was making a financial contribution to the relationship including to the purchase of their home. However, since moving to Australia and marrying she is no longer working and is being supported by the sponsor. The parties indicated that they use their joint saving account for ongoing savings, emergencies and major expenses. They also have a joint access account which is primarily used by the applicant and where the sponsor deposits monies fortnightly for groceries and personal spending. This evidence is also supported by bank statements provided by the parties.
36. The parties' oral testimony was consistent with the documentary evidence they provided about their financial arrangements. The Tribunal accepts this evidence.
37. The Tribunal is satisfied on the evidence that the parties' financial arrangements are such that would indicate a genuine and committed spousal relationship at the time of the application being made and at the time of this decision.

38. *Nature of the household*

39. The Tribunal has had regard to the evidence as to the nature of the household including the parties' living arrangements and any sharing of housework.
40. The parties gave evidence that the applicant was living in Hong Kong where she was working until the parties married in October 2015. They are now residing together in a property they purchased through joint funds in Nollamurra. The property is in the sponsor's name only. The parties indicate this is due to advice from their mortgage broker regarding the likelihood of obtaining a mortgage on a property which included the applicant on the title before she had a permanent visa. The Tribunal notes that it is possible for non-residents to own property in Australia however the Tribunal accepts that the parties may have received advice that the inclusion of the applicant on the title may have impacted their mortgage options. The Tribunal also notes the evidence of financial contribution to the purchase made by the applicant.
41. There was sufficient documentary evidence that the parties share an address in Nollamurra and have done so since the applicant moved to Australia in September 2015 prior to their marriage in October 2015. There is evidence the parties' were residing at the property from July 2015, however at this stage the applicant was still living in Hong Kong. Evidence included joint utilities at that address, and bank statements and other correspondence addressed to the parties jointly and individually at that address.
42. The parties gave consistent evidence that household responsibilities are primarily met by the applicant as she is currently not working in paid employment.

43. The parties do not have children together however they gave oral evidence that they intend to start a family once the applicant's visa status is resolved. The sponsor has children from a previous marriage, the parties gave consistent evidence that they are living with their mother in Hong Kong and that the parties do not have contact with them. The sponsor also has a child from a previous relationship in Singapore however he does not have any contact with the child. While the applicant has not met the sponsor's children she displayed knowledge of their circumstances and an understanding of the history of the sponsor's relationship with them.
44. The Tribunal is satisfied on the sworn evidence that the nature of the parties' household is such that it would indicate a genuine spousal relationship at the time of the application being made and the time of this decision.

45. *Social aspects of the relationship*

46. The Tribunal has had regard to the evidence provided as to whether the parties represent themselves to others as being in a genuine married relationship, the opinion of their friends and acquaintances about the nature of the relationship and any basis on which the parties plan to undertake joint social activities.
47. The parties provided supporting material including photographs, invitations to significant events, correspondence from friends addressed to both parties and supportive statements from friends including oral testimony at the hearing from Miss Tee, a friend of the couple's from their church community and a statutory declaration from Mr Yap, another member of their church community.
48. Ms Tee indicated that she sees the couple up to twice a week individually and together predominantly through their church group. She observed that the parties had a healthy relationship and that she had had conversations with them regarding their future plans for starting a family. The Tribunal found Ms Tee's evidence to be candid and placed weight on the fact she has spent time with the couple individually and together over a number of years. Mr Tay gave evidence of the couple's involvement with the church community and the development of their relationship which supported with the parties' account of their relationship history and current status.
49. The parties gave evidence that they have met each other's parents who attended their wedding. In addition the applicant has travelled to Singapore and spent time with the sponsor's family including meeting some of his siblings. The Tribunal places weight on the fact that while friends were not present at the wedding, both parties' parents travelled from overseas to attend their wedding.
50. The parties provided evidence which is was consistent with social interaction with friends and family particularly within their local church community.
51. The evidence portrays a couple who are committed to each other and recognised as being in a genuine and committed relationship by their friends, family and acquaintances. This is consistent with the way the couple presented at the oral hearing. The Tribunal is satisfied based on the oral testimony and supporting documentary evidence that the parties represent themselves socially in such a way as to indicate a genuine spousal relationship at the time of the application and at the time of this decision.

52. *Nature of the parties' commitment*

53. The Tribunal has had regard to the evidence provided in relation to the nature of the parties' commitment to one another including the duration of the relationship, the length of time they

have lived together, the degree of companionship and emotional support they draw from each other, and whether they see the relationship as long-term.

54. The Tribunal is satisfied that the parties first met in late 2013. While the parties were initially living separately in Hong Kong and Australia they were able to consistently describe the gradual development of their relationship and demonstrate a commitment to maintaining it prior to their marriage in October 2015 from which date the Tribunal is satisfied they have been living together in Australia.
55. It was evident at the hearing that the parties have drawn significant social and emotional support from one another during the course of their relationship. The sponsor in particular relied on the applicant in the early stages of their relationship when he was suffering the emotional effects of the breakdown of his previous marriage and his separation from his children.
56. The parties presented at the hearing as a close and committed couple. The Tribunal is satisfied as to the genuineness of their relationship. The Tribunal is satisfied that they provide companionship and emotional support to one another and that they view the relationship as long-term. The Tribunal is satisfied on the evidence that the nature of the parties' commitment to each other demonstrates a genuine spousal relationship at the time the application was made and at the time of this decision.

57. Summary of Findings

58. Based on the evidence before it the Tribunal is satisfied that at the time of the application and at the time of the decision the parties have a mutual commitment to a shared life to the exclusion of all others. The Tribunal finds the parties are in a genuine and continuing relationship and that they live together and not separately and apart on a permanent basis. Accordingly they meet the requirements for s.5F(2)(b)-(d) of the definition of spouse in the Act.
59. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
60. Therefore, the applicant meets cl.820.211(2)(a). The Tribunal accepts that the applicant was sponsored and therefore meets cl. 820.211(2)(c), and as she was the holder of a substantive visa at time of application, cl.820.211(2)(d) does not apply. The applicant continues to meet these requirements at the time of decision. She therefore meets cl.820.221(1).
61. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

62. Additional issues raised by the applicant's representative

63. The Tribunal notes that the applicant's representative invited the Tribunal to make a determination on the applicant's permanent visa under subclause 801 given the parties relationship was of more than two years standing.
64. The Tribunal notes the applicant's application for review was in respect of the subclass 820 visa. In any event, as the Tribunal is remitting the application for the remaining criteria for a Subclass 820 visa to be considered, the Tribunal cannot consider whether the criteria for a subclass 801 visa have been met. In this regard, the Tribunal notes that one of the criteria for a subclass 801 visa is that the applicant holds a subclass 820 visa.

DECISION

65. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(2) of Schedule 2 to the Regulations
 - cl.820.221(1) Of Schedule 2 to the Regulations

Simone Burford
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).